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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROY TRUJILLO, Defendant and Appellant.	D068589 (Super. Ct. No. SCD251274)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Allison V. Hawley, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Roy Trujillo guilty of assault with a deadly weapon (Pen. Code, § 254, subd. (a)(1)),[1] and found true that he personally inflicted great bodily injury on John Duran (§ 12022.7, subd. (a)). The jury acquitted Trujillo of the identical charge and special allegation related to victim Isaac Grant. The trial court sentenced Trujillo to a total term of five years in prison.

Trujillo appeals, contending: (1) he received ineffective assistance from defense counsel because counsel failed to move *in limine* to exclude evidence of Trujillo's postarrest, pre-*Miranda*[2] silence on relevance and undue prejudice grounds and failed to object to statements made in the prosecutor's closing argument that constituted *Doyle*[3] error; (2) this Court should reconsider our Supreme Court's decision in *People v. Tom* (2014) 59 Cal.4th 1210 (*Tom*); (3) the prosecutor committed misconduct in closing argument that rendered his trial fundamentally unfair and his defense counsel's failure to object to the misconduct constituted ineffective assistance; (4) the cumulative effect of his counsel's ineffective assistance and the prosecutor's misconduct warrants reversal; and (5) insufficient evidence supports the jury's finding on the great bodily injury enhancement.[4] We reject Trujillo's arguments and affirm the judgment.

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1 Undesignated statutory references are to the Penal Code.

2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

3 *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

4 In his opening brief, Trujillo also argued the trial court erroneously permitted the prosecutor to impeach a witness with inadmissible hearsay. Trujillo withdrew the

FACTUAL AND PROCEDURAL BACKGROUND

The Alpha Project is a winter shelter that provides the homeless a bed for up to 45 days. In order to obtain a space in the shelter, a person lines up on 16th Street in the evening and the shelter gives out numbers to those present. If a person's number is called, they get a bed in the shelter. On an evening in October 2013, Carl Hankins was homeless and waiting in line to get a bed in the shelter. Hankins heard Trujillo ask a security guard, John Duran, why Trujillo had been kicked out of the shelter. The guard explained that he was not the one that kicked Trujillo out; rather, it was someone on the previous shift. Duran told Trujillo that if he did not leave the shelter, he would be escorted off the premises.

Duran grabbed Trujillo's backpack and sleeping bag and took them across the street. Trujillo followed. Then, Trujillo and Duran started yelling at each other. According to Hankins, Duran grabbed Trujillo by the collar, threw him against a fence multiple times, and said, "You don't want to leave, we'll make you leave." Duran did not punch Trujillo, but handled him roughly. Trujillo "pulled something" and Duran jumped back and said, "He got me." Another security guard assisted Duran in trying to restrain Trujillo.

According to Duran, after he put Trujillo's bags down across the street from the shelter, Trujillo grabbed his shoulder. Duran reacted by grabbing Trujillo's hand and

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argument in his reply brief, conceding the challenged evidence was admissible as a past recollection recorded under Evidence Code section 1237, subdivision (a)(2). Accordingly, we do not address the hearsay argument. Further, based on Trujillo's concession, we do not address the impact of the admission of the evidence on Trujillo's cumulative error argument.

pinning him up against a fence. As Duran held Trujillo against the fence, Trujillo grabbed something with his right hand and stabbed Duran in the lower chest area. Duran pushed Trujillo away. Duran testified that he did not punch, kick, rough up, or threaten to harm Trujillo.

Duran stated that two other security guards, Grant and Javier Juarez, came to his aid. They tackled Trujillo to the ground. Trujillo tried to get away and Duran hit him in the back. When the three security guards realized that Grant had also been stabbed, they backed away and Trujillo ran off. An ambulance arrived and took Duran to the emergency room where he was checked for internal bleeding and received three stitches for his stab wound. The wound left a permanent scar.

Grant was a reluctant witness and testified at trial to avoid having a warrant issued for his arrest. Grant claimed he did not remember the incident involving Trujillo. Grant recalled being hurt at work, but did not remember the specifics of how it occurred. He recognized a photograph of his bloody foot, but stated he did not remember when the photograph was taken. Grant did not remember being taken to the hospital in an ambulance or speaking to the police.

San Diego Police Officer Matthew Johnson spoke with Grant on the night of the incident. Grant said he had been stabbed and showed Officer Johnson the stab wound on his foot. Grant was cooperative and identified Trujillo in a curbside lineup. San Diego Police Detective Christopher Tews interviewed Grant at the hospital. In a recorded interview, Grant told Detective Tews that he helped Juarez escort Trujillo out of the shelter. As Grant was walking back to the shelter, he saw Duran taking Trujillo's

belongings across the street. Grant then saw Trujillo and Duran engage in a confrontation. Juarez and Grant went to help Duran and the three security guards got Trujillo to the ground. The security guards backed away when Duran said that he had been stabbed. Trujillo grabbed his belongings and ran up the street. Grant then noticed that his foot felt wet and his whole sock was bloody.

Juarez testified that he did not remember much about the night of the incident. However, San Diego Police Officer Ariel Savage testified about her interview of Juarez shortly after the crime. Juarez told Officer Savage that Trujillo had been cursing at an elderly lady and was kicked out of the shelter. Juarez reported that Duran escorted Trujillo across the street from the shelter and then Duran yelled, "I've been stabbed. I was stabbed." At that point, Juarez ran across the street and held Trujillo on the ground. Moments later, Trujillo was able to get up and walk away.

San Diego Police Officer Jason Hagel responded to a call of a stabbing near the Alpha Project. The call included a suspect description and the suspect's direction of travel. Officer Hagel located Trujillo about two blocks away from the Alpha Project. Trujillo had a blanket and backpack with him. Officer Hagel patted Trujillo down and handcuffed him. Officer Hagel found a folding knife tethered to Trujillo's right wrist and concealed under his shirt sleeve. The opened knife measured seven inches, including the blade and handle. The blade of the knife had a red spot on it. Officer Hagel took Trujillo to the location of the curbside lineup near the crime scene. After witnesses identified Trujillo in the lineup, Officer Hagel placed him under arrest. Officer Hagel found another knife in Trujillo's backpack.

Defense

Trujillo testified that he was homeless and had stayed at the Alpha Project shelter for three years. In October 2013, Trujillo had been staying at the shelter for approximately 15 days when a woman approached him, told him that he looked unhappy, and said he had to leave. Duran guided Trujillo out of the shelter. As Duran escorted Trujillo out of the shelter, Duran pushed Trujillo a couple times and grabbed his arm. Trujillo said that he wanted his belongings before he left. Someone brought Trujillo's belongings to Duran and Duran took them across the street. Trujillo followed Duran who had dropped Trujillo's belongings. As Trujillo rummaged through his things to make sure nothing was missing, Duran grabbed him by the collar and threw him against the fence three times. Duran put his blanket over his head to protect himself. Grant and another person jumped in and threw Trujillo to the ground. They kicked him and punched him multiple times. After approximately 10 minutes, Trujillo heard sirens and "everybody just bailed."

Trujillo testified that he stayed in the same spot and did not walk down the street when an officer contacted him. Trujillo had a knife attached to his wrist because he had been attacked in the past. He was scared when Duran threw him against the fence and "might have gotten to [his knife]." Trujillo was not sure whether or not he used the knife. It was "possible" that he opened the blade of the knife and held it to his face when he was being beaten. Trujillo did not try to hit anyone because he was overpowered. He did not swing at Duran or purposefully stab him.

DISCUSSION

A.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON TRUJILLO'S SILENCE

We first address Trujillo's claims that he received ineffective assistance from defense counsel because counsel (1) failed to object or move *in limine* to exclude evidence of his postarrest, pre-*Miranda* warning silence to police on relevance and prejudice grounds; and (2) failed to object to the prosecutor's closing argument, which Trujillo asserts was improper argument under *Doyle*.

We pause briefly to recite the trial testimony and closing argument passages cited by Trujillo in support of these claims.

During cross-examination, Trujillo testified that he suffered multiple injuries during the incident with the shelter security guards. The following colloquy occurred:

> "Q: And you pointed out all of these injuries and things that were going on to the detective, Detective McCoy?
>
> "A: No.
>
> "Q: You didn't tell him about that?
>
> "A: No. I was upset that it happened. I was already under arrest and it didn't make any sense to really say anything.
>
> "Q: But here today, all this is very clear about exactly how your body turned and you holding the blanket and the knife over your head?
>
> "A: Yes."

During the prosecutor's rebuttal closing argument, the prosecutor argued that a "normal person" in fear for his life would not flee the scene. Instead, that person would

flag down the police and tell them that he had been attacked. Trujillo, however, did not say anything. The prosecutor continued, "I asked him if he told police officers about his injuries[.] [N]o. He didn't think it was important. Because it didn't happen. They didn't beat him up, it didn't happen, he just thought about that today when he testified."

Analysis

1. *Standards Governing Claims of Ineffective Assistance of Counsel*

Because Trujillo asserts defense counsel rendered ineffective assistance, we first set forth the general rules governing such claims. (U.S. Const., 6th Amend.; Cal. Const., art. I, §15.)

" 'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' " (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980 (*Johnson*).)

" 'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." ' [Citations.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ' " 'no conceivable tactical purpose' " for counsel's act or omission.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 674-675.) "The decision whether to object to the admission of evidence is 'inherently

tactical,' and a failure to object will rarely reflect deficient performance by counsel." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.) "[R]arely will an appellate record establish ineffective assistance of counsel." (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

Before turning to an analysis of whether Trujillo's counsel rendered ineffective assistance, we will discuss the substantive law governing the treatment of a defendant's postarrest, pre-*Miranda* warning silence.

2. *Law Governing a Defendant's Postarrest, Pre-Miranda Warning Silence*

"No person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) As a corollary rule, where a defendant receives advisements required by *Miranda*, and properly invokes the right of silence, the prosecution may not use the defendant's silence to impeach the defendant's testimony at trial. (*Doyle, supra*, 426 U.S. at pp. 618-619 & fn. 10.) This is because the prophylactic *Miranda* advisements implicitly assure "silence will carry no penalty," and "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Doyle*, at pp. 617-618.)

Whether evidence of a defendant's postarrest, pre-*Miranda* warning silence can be used against the defendant was addressed by our Supreme Court in *People v. Tom*, *supra*, 59 Cal.4th 1210. There, the court held admission of evidence of a defendant's postarrest, pre-*Miranda* silence is not barred by the Fifth Amendment in the absence of either custodial interrogation or a clear invocation of the privilege. (*Id*. at p. 1236.)

A defendant seeking to rely on the privilege against self-incrimination must show that he clearly invoked the privilege at or before the time of his silence. The threshold inquiry is whether a reasonable police officer in the circumstances would understand that the defendant had invoked the privilege. (*Tom, supra*, 59 Cal.4th at p. 1228.) The *Tom* court acknowledged a defendant might remain silent in the postarrest, pre-*Miranda* context in an attempt to invoke the privilege or might remain silent for reasons unassociated with his rights under the Fifth Amendment. (*Id.* at pp. 1231-1232.)

In making its ruling that use of postarrest, pre-*Miranda* silence was not a constitutional violation except where a defendant clearly invokes the privilege or is in a custodial setting, the court nevertheless cautioned that a defendant's silence might be too ambiguous to have any probative value as an indicator of guilt.[5] Thus, the court explained, the probative value of a defendant's silence must be assessed in each individual case under Evidence Code section 352. (*Tom, supra*, 59 Cal.4th at pp. 1236-1237.)

Given the evidentiary questions involved, the *Tom* court advised that "the *better practice* for a party seeking to offer evidence of postarrest, pre-*Miranda* silence or a party

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[5] The court noted, "[o]ne source of ambiguity is the ubiquity of *Miranda* warnings in popular culture and the extent to which a defendant may have subjectively intended to rely on the privilege, even if that intent was not communicated to law enforcement officers." (*Tom, supra*, 59 Cal.4th at p. 1236; see also *People v. Fondron* (1984) 157 Cal.App.3d 390, 400 [prosecutor's argument regarding defendant's failure to provide an exculpatory statement to the arresting officer was improper because defendant's silence was "so ambiguous as to have little or no probative value and was greatly outweighed by its prejudicial effect"].)

seeking to exclude such evidence is to proceed by way of a motion *in limine*, which will offer the trial court the opportunity to develop a record as to whether the circumstances would have made it clear to the officer that the defendant had invoked the privilege against self-incrimination, whether the evidence of silence is relevant, and, if so, whether its probative value is substantially outweighed by the probability of undue consumption of time or undue prejudice under Evidence Code section 352." (*Tom, supra*, 59 Cal.4th at p. 1237, italics added; see also *Fletcher v. Weir* (1982) 455 U.S. 603, 607 ["A State is entitled . . . to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony."].)

3. *Trujillo's Counsel Did Not Render Ineffective Assistance by Failing to Object or Move In Limine to Exclude Evidence of His Postarrest, Pre-Miranda Silence.*

Relying largely on *Tom*, Trujillo argues his counsel rendered ineffective assistance because counsel did not move *in limine* to exclude, or object to, the prosecutor's references to evidence of his postarrest, pre-*Miranda* warning silence under Evidence Code sections 352 and 1101. Specifically, Trujillo claims counsel should have sought to prevent the jury from hearing evidence that Trujillo did not point out his injuries to police at the scene or tell them that he was acting in self-defense, because the evidence was ambiguous and not relevant to any issue in the case. Trujillo argues that had counsel made such a motion it likely would have been successful, as the reason he gave for not speaking to the officers was that he was upset, already under arrest, "and it didn't make any sense to really say anything." We are not persuaded.

The decision whether to object to evidence at trial is a matter of trial tactics and seldom will establish that counsel was incompetent. (*People v. Lucas* (1995) 12 Cal.4th 415, 444-445.) As is important here, "[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*Id.* at p. 442; see also *People v. Anderson* (2001) 25 Cal.4th 543, 569.) The record here fails to make that showing.

First, counsel may not have wished to highlight Trujillo's silence by objecting to the evidence in front of the jury. Second, counsel may have made the assessment that objecting to the evidence, or making a motion *in limine* to exclude it, would have been futile as defendant's silence was relevant to impeach his testimony and, given the prosecutor's brief references to defendant's silence, was not unduly prejudicial. (See *People v. Thompson*, *supra*, 49 Cal.4th at p. 122 [counsel does not render ineffective assistance for failing to make frivolous or futile motions]; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 628 [prosecutor's references to fact that, before defendant was given *Miranda* warnings, he did not tell anyone shooting was accidental were proper because "[s]uch silence is probative"]; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 244 ["evidence of the accused's silence is admissible to impeach a defense offered for the first time at trial"].) Third, and finally, although the *Tom* court stated the "better practice" for a party seeking to exclude evidence of a defendant's postarrest, pre-*Miranda* silence is to bring a motion *in limine*, the Supreme Court did not mandate use of that procedure.

(*Tom, supra*, 59 Cal.4th at p. 1237.) Counsel here may have decided that it would have been more effective to argue to the jury that defendant's silence was of limited relevance.

Given the " 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' " we conclude that counsel's conduct in this case fell within that range and counsel's inaction was a matter of sound trial strategy. (*People v. Lucas, supra*, 12 Cal.4th at p. 437.)

4. *Trujillo's Counsel Did Not Render Ineffective Assistance by Failing to Object to the Prosecutor's Closing Argument as Doyle Error.*

a. The Prosecutor's Closing Argument Did Not Constitute *Doyle* Error

In rebuttal argument, the prosecutor argued that Trujillo's conduct of leaving the scene after the stabbing was not what a person who had acted in self-defense would have done. Specifically, the prosecutor stated:

> "Now, he didn't flee because he was in fear for his life. That is not what a normal person does. They hear sirens they would be flagging the police down, they would be telling them what happened, 'Hey, oh, my gosh, I just got attacked.' He didn't say anything. I asked him if he told police officers about his injuries[.] [N]o. He didn't think it was important. Because it did not happen. They didn't beat him up, it didn't happen, *he just thought about it today when he testified*." (Italics added.)

Trujillo contends his counsel rendered ineffective assistance by failing to object to the above argument, asserting it constituted *Doyle* error, as interpreted by our Supreme Court in *People v. Belmontes* (1988) 45 Cal.3d 744, 786-787 (*Belmontes*). Specifically, Trujillo's argument is directed to the last clause of the argument wherein the prosecutor

states Trujillo "just thought about [his self-defense claim] today when he testified."[6] In Trujillo's view, the prosecutor's statement violated his post-*Miranda*, postappointment of counsel right to remain silent. Trujillo further contends that even if the prosecutor did not commit *Doyle* error, his counsel should have objected because the prosecutor's statement that "he just thought of it today" was not a fair comment on the evidence.

We are not persuaded by Trujillo's arguments because the prosecutor had wide latitude to argue her case and to make a fair comment on the evidence, including reasonable inferences and deductions therefrom. The prosecutor's comment was merely challenging Trujillo's credibility and the reliability of his defense. Further, Trujillo has failed to establish ineffective assistance because his counsel could have reasonably made a tactical decision not to object to the prosecutor's argument.

We first turn to the law governing the prosecutor's use of a defendant's postarrest, post-*Miranda* silence. In *Doyle*, the United States Supreme Court held the prosecution may not use a defendant's postarrest, post-*Miranda* silence to impeach the defendant's trial testimony. (*Doyle, supra*, 426 U.S. at p. 619.) *Doyle* involved two defendants who, after being arrested and advised of their *Miranda* rights, made no statements, but subsequently testified at trial they had been framed. On cross-examination, the prosecutor asked the defendants why, if they were innocent, they did not offer this explanation at the time of their arrest. (*Id*. at pp. 612-614.) The court concluded such

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6 Trujillo did not develop an argument about any other portion of the prosecutor's above statement. Thus, any challenge to the remaining quoted portion of the prosecutor's argument is forfeited. (California Rules of Court, rule 8.204(a)(1)(B).)

impeachment was fundamentally unfair and a deprivation of due process because *Miranda* warnings carry an implied assurance that silence will carry no penalty. (*Id*. at p. 618.)

In *Belmontes,* the California Supreme Court held that the prosecutor's questioning of the defendant about his postarrest silence could have violated both the defendant's post-*Miranda* and postappointment of counsel right to remain silent. (*Belmontes, supra*, 45 Cal.3d at p. 785.) Specifically, questions that elicit a defendant's testimony that he made no statements about the crime *after being appointed an attorney,* but before trial, run afoul of *Doyle*. (*Belmontes*, at pp. 785, 786.) The Court stated that while the prosecutor may have intended to point out inconsistencies between the defendant's extrajudicial statements and trial testimony, which is a "permissible avenue of impeachment," the prosecutor's questions had the potential to elicit improper testimony in violation of *Doyle* (post-*Miranda* silence) and *Massiah v. United States* (1964) 377 U.S. 201 (postappointment of counsel silence). (*Belmontes, supra*, 45 Cal.3d at pp. 784-786.)

In this case, the prosecutor did not violate *Doyle*. "An assessment of whether the prosecutor made inappropriate use of defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument." (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448.) "[A] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (*People v. Dykes* (2009) 46 Cal.4th 731, 768 (*Dykes*).)

Reading the prosecutor's statement in context, she was not commenting on Trujillo's post-*Miranda* or postappointment of counsel silence. Rather, the prosecutor's argument was a comment on Trujillo's credibility and the reliability of his self-defense claim. A prosecutor is entitled to challenge a defendant's credibility by arguing that he fabricated his defense or came up with a " 'new version' " of events when he testified at trial. (*Dykes, supra*, 46 Cal.4th at pp. 768-769.) Trujillo fled the scene, did not flag down officers, and when eventually contacted by the police, did not tell them about his injuries. The first time Trujillo claimed he was attacked was during his trial testimony. Based on this evidence, the prosecutor's comment that Trujillo fabricated his claim that security guards beat him up was a reasonable inference within the prosecutor's wide latitude of argument. (*Dykes, supra*, 46 Cal.4th at pp. 768-769.) "It [is] within the broad bounds of permissible argument to suggest that defendant's trial testimony . . . differed from his prior statements and was framed to coincide with an imagined defense." (*Id.* at p. 769.) Put simply, the prosecutor's argument did not cross the line into *Doyle* error because it was not a comment on Trujillo's post-*Miranda* or postappointment of counsel silence.

b. Trujillo Did Not Establish Ineffective Assistance of Counsel

We next address and reject Trujillo's argument that his counsel was ineffective for failing to object to the prosecutor's comment that Trujillo "just thought about [his self-defense claim] today when he testified." "[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one" (*People v. Padilla* (1995) 11 Cal.4th 891, 942), and "a mere failure to

object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772; see also *People v. Kelly* (1992) 1 Cal.4th 495, 540 [an attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel].)

In light of the context of the prosecutor's argument, defense counsel could have made a tactical decision not to object because the prosecutor's comment was not directed at Trujillo's post-*Miranda*, postappointment of counsel silence. Rather, the prosecutor was arguing that Trujillo's postarrest conduct was inconsistent with his trial testimony. In a situation like this where "the prosecutor was not taking unfair advantage of defendant's exercise of his constitutional right to remain silent," defense counsel could have acted well within the bounds of reasonable competence had he chosen to ignore the statements rather than draw attention to them with an objection. (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1451; see *People v. Wharton* (1991) 53 Cal.3d 522, 567 [finding no ineffectiveness where counsel failed to object to prosecutor's referral to evidence outside the record on direct appeal because counsel might not have wanted to highlight the point with the jury and make it wonder if there really was such evidence]; *People v. Milner* (1988) 45 Cal.3d 227, 245 [finding no ineffective assistance of counsel where even if one or more of the statements were improper, none of them took up more than a few lines of the prosecutor's lengthy closing argument, and counsel would have acted well within the bounds of reasonable competence had he chosen to ignore the statements rather than draw attention to them with an objection].)

Based on the foregoing, we conclude Trujillo failed to establish ineffective assistance based on counsel's failure to object or move *in limine* to exclude evidence of Trujillo's postarrest, pre-*Miranda* silence and failure to object to the prosecutor's closing argument as *Doyle* error.

B.

WE ARE BOUND BY OUR SUPREME COURT'S DECISION IN *TOM*

Trujillo argues this Court should reconsider our high court's decision in *Tom* that "use of a defendant's postarrest, pre-*Miranda* silence is not barred by the Fifth Amendment in the absence of custodial interrogation or a clear invocation of the privilege." (*Tom, supra*, 59 Cal.4th at p. 1236.) Trujillo contends *Tom* "necessarily reaffirms that th[e] constitutionally reprehensible and unfair practice [of police officers delaying *Miranda* warnings to arrestees] is in full compliance with an arrestee's Fifth Amendment privilege." We reject this argument.

We are not free to disregard or overrule *Tom* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455); only the Supreme Court may revisit and overrule its decisions. (*Rodriguez v. Bethlehem Steel Corp*. (1974) 12 Cal.3d 382, 388.) Moreover, we note that our high court considered the potential " ' "incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant," ' " but found "a defendant could easily eliminate any such risk by clearly and timely invoking the privilege." (*Tom, supra*, 59 Cal.4th at p. 1234.)

C.

TRUJILLO FORFEITED HIS CLAIMS OF PROSECUTORIAL MISCONDUCT AND FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE FOR FAILURE TO OBJECT TO THE ALLEGED PROSECUTORIAL MISCONDUCT

Trujillo argues the prosecutor engaged in pervasive misconduct during closing argument that rendered his trial fundamentally unfair. As discussed below, we reject Trujillo's argument because he forfeited his claims of prosecutorial misconduct by failing to object and request curative admonitions in the trial court. Anticipating our conclusion, Trujillo contends his defense counsel's failure to object to the misconduct constituted ineffective assistance. We reject Trujillo's ineffective assistance claim, for the reasons discussed below.

1. *Trujillo Forfeited His Prosecutorial Misconduct Claims by Not Objecting at Trial*

Trujillo asserts three instances of prosecutorial misconduct occurred during closing argument. We set forth Trujillo's alleged claims of misconduct in detail to provide context for our discussion of Trujillo's assertion of ineffective assistance.

First, Trujillo contends the prosecutor misstated the law by telling the jury that it had to take an " 'all or nothing' " approach to witness testimony and could only acquit him if it believed " 'every single thing' " he said and disbelieved " 'every other witness' " in the case. Specifically, Trujillo complains that the prosecutor improperly stated the following during rebuttal argument:

> "And so you have to you – *you can't just pick and choose*, 'Well I like this part of Mr. Hankins' statement but I don't believe anything else and I'm going to ignore,' you know 'where the defendant was in the scene, and I'm going to think about the possibility, and I'm going

> to pick and choose facts to make the defense story make sense.' You can't do that. You have to take it all as it is.
>
> "And the defense theory in this case doesn't make sense. It's not reasonable. *To believe the defense and it was self-defense, again you have to believe every single thing the defendant said and you have to ignore every other piece of evidence and witness.* And if, when you got back there that's – you know, that's the way you feel, that you don't believe every other witness that testified in this case and you believe everything the defendant said, then, yeah, he's not guilty."

Second, Trujillo argues the prosecutor misstated the facts by telling the jury that he was the only person who testified that Duran was violent. In particular, Trujillo complains that the following portion of the prosecutor's rebuttal closing argument misstated the facts because it ignored Hankins's testimony that Duran slammed Trujillo against a fence several times:

> "He was trying to get away and he had a knife, of course they are going to use some type of force, whether it's holding him down but there's no testimony that he was kicked, hit, or punched, other than Duran admitting that, yeah, when he was down I punched him. That's it. There's no, 'it took three guys, he was getting beat up,' there was nothing except for his testimony. That's the only place it came from. Again, you'd have to ignore everybody else's -- everybody else's testimony."

Lastly, Trujillo argues the prosecutor misstated the facts by telling the jury that Duran, Juarez, and Grant were consistent in their story that Grant and Juarez jumped in to help Duran after Duran stated he had been stabbed. On this point, Trujillo points to the following statement during the prosecutor's closing argument:

> "You've got Isaac Grant's initial statement. I'm not going to go over those again. You heard those. You've got Javier Juarez's initial statement. They all told the same story. He had been kicked out

> early in the day, he was trying to get back in, kept asking why. They walked him across the street Grant did -- or, I'm sorry. Duran walked him across the street. They saw something happen, they heard him back up, say 'I got stabbed,' that's when they come in to help. This was all contradictory to everything the defendant said."

Trujillo contends the prosecutor misstated the facts because Grant said in a recorded interview with police that Duran said he had been stabbed *after* Duran, Grant, and Juarez got Trujillo on the ground.

Without reaching the merits of Trujillo's prosecutorial misconduct argument, we conclude that the argument has been forfeited. The law governing claims of prosecutorial misconduct is well established. Prosecutorial misconduct exists " 'under state law only if it involves " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Earp* (1999) 20 Cal.4th 826, 858.) In more extreme cases, a defendant's federal due process rights are violated when a prosecutor's improper remark " ' " 'infect[s] the trial with unfairness,' " ' " making it fundamentally unfair. (*Ibid.*) However, " '[t]o preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition.' " (*Ibid.*) As an exception to this rule, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Here, defense counsel did not object to the prosecutor's comments during closing argument, and made no request that the jury be admonished. Although the "defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct" (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674), Trujillo has not established that an objection or admonition would have been futile. Indeed, as the alleged misconduct consisted of purported misstatements of facts and law they could have easily been corrected by the trial court with an admonition. Specifically, on the alleged misstatements of law, the trial court could have set forth the correct rule of law or directed the jury to look to the law as stated in the jury instructions rather than as argued by counsel. As our Supreme Court recently pointed out in a similar context, "[a] prosecutor's misstatements of law are generally curable by an admonition from the court." (*Ibid*.) Likewise, the alleged misstatements of fact could have been cured with an admonition that nothing the attorneys say is evidence, only witnesses' answers are evidence, and that the jury should disregard an attorney's characterization of the facts that conflicts with the facts as determined by them. The trial court in this case provided that type of admonition when defense counsel objected to other portions of the prosecutor's argument on the basis that it misstated the facts. Thus, an objection would not have been futile.

We therefore conclude that Trujillo may not pursue the issue of prosecutorial misconduct on appeal because the issue has been forfeited.

2. *Trujillo has failed to Establish That Counsel Was Ineffective for Failing to Object to the Alleged Prosecutorial Misconduct*

Acknowledging his claims of prosecutorial misconduct may have been forfeited, Trujillo contends that defense counsel was ineffective for failing to object. As we shall explain, we reject Trujillo's claim of ineffective assistance.

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) As we previously explained, defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Johnson*, *supra*, 60 Cal.4th at pp. 979-980.)

First, as to the prosecutor's statement that the jury must believe all or nothing that a witness said, we agree with Trujillo that this was a misstatement of the law. However, Trujillo was not prejudiced by the prosecutor's inaccurate statement of the law because the trial court instructed the jury with CALCRIM No. 226, which provided: "You may believe all, part, or none of any witness's testimony. [¶] . . . [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the

differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] . . . [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest." The trial court also instructed the jury that "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions" (CALCRIM No. 200).

We presume the jury followed the court's instructions, absent evidence to the contrary. (*People v. Johnson* (2015) 61 Cal.4th 734, 770 ["We presume the jurors understood and followed the instructions."]; *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 ["We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate."].) Thus, Trujillo failed to establish prejudice from defense counsel's failure to object that the prosecutor misstated the law on witness testimony.

Second, defense counsel was not ineffective by failing to object to the prosecutor's comment that Trujillo's testimony was the only evidence that three security guards kicked, hit, punched or beat him up. The prosecutor's comment conformed to the evidence. " ' " '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' " (*People v. Hill,*

supra, 17 Cal.4th at p. 819.) Although Trujillo relies on Hankins's testimony that Duran threw Trujillo against a fence multiple times to support his argument, Hankins also testified that he did not see anyone punch Trujillo. Rather, according to Hankins, Duran was "rough handling" Trujillo. Based on this evidence, the prosecutor did not misstate the facts and an objection was not warranted.

Even if defense counsel should have objected, the failure to do so did not prejudice Trujillo because the trial court properly instructed the jury on conflicts between the attorneys' arguments and the evidence. In that regard, the trial court informed the jury that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence" (CALCRIM No. 222). Thus, even without an objection from defense counsel that the prosecutor misstated the facts, we presume the jury understood and followed the trial court's instruction. (*People v. Johnson, supra*, 61 Cal.4th at p. 770.)

Lastly, even if the prosecutor mischaracterized the evidence by arguing that Duran, Juarez, and Grant were consistent in their story that Grant and Juarez jumped in to help Duran *after* Duran stated he had been stabbed, Trujillo has not established that he was prejudiced by the prosecutor's argument. Again, the trial court instructed the jury with CALCRIM No. 222, advising that witness testimony controls over an attorney's remarks. Nothing in the record indicates that the jury misunderstood or failed to follow the court's instruction. Accordingly, Trujillo's claim of ineffective assistance fails as he has not shown he was prejudiced.

D.

TRUJILLO HAS NOT ESTABLISHED CUMULATIVE ERROR WARRANTING REVERSAL

Trujillo argues that the cumulative effect of the prosecutor's alleged misconduct and trial counsel's ineffective representation warrants reversal. The " 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) In light of our conclusion that Trujillo's claims of error, considered separately, have no merit, we reject his contention that cumulative error requires reversal. Consequently, we conclude the accumulation of the claimed errors did not deprive Trujillo of due process and a fair trial.

E.

SUFFICIENT EVIDENCE SUPPORTED THE GREAT BODILY INJURY ENHANCEMENT

Trujillo argues insufficient evidence supported the great bodily injury enhancement because Duran suffered only a minor wound. We reject Trujillo's argument.

In reviewing a challenge to the sufficiency of the evidence, we examine the entire record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) We presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*Ibid*.) If the circumstances reasonably justify the jury's findings

reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Ibid.*)

The enhancement statute for personal infliction of great bodily injury defines great bodily injury as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) "[D]etermining whether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] ' "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description." ' [Citations.] Where to draw that line is for the jury to decide." (*People v. Cross* (2008) 45 Cal.4th 58, 64.) Although the injury must be more than trivial or moderate, it need not be so grave as to cause the victim permanent or prolonged bodily damage. (*Ibid.*) Great bodily injury may be established by evidence of the severity of the injury, the resulting pain, or the medical care required to treat or repair the injury. (*Id.* at p. 66.)

Trujillo argues insufficient evidence supported the enhancement because Duran suffered only a "minor laceration" and "was not in any way physically impacted by the wound." To support his challenge to the jury's finding, Trujillo points to various facts, including that Hankins testified that Duran "lifted up his shirt, and it wasn't really like a cut or anything, more like a pinprick, but he made a big scene like he was bleeding profusely." Thus, Trujillo argues the evidence was insufficient to show anything more than minor or moderate harm. We are not persuaded.

An ambulance took Duran to the hospital where a doctor examined him in the emergency department trauma center. Duran suffered a two centimeter laceration to the

left thoracoabdominal region, underwent a chest x-ray, and "[g]iven the location of the injury and depth assess on wound examination," the medical personnel "opted to proceed with diagnostic peritoneal lavage to [rule out] intra-abdominal or diaphragmatic injury." Duran received three sutures and the injury left a permanent scar. This evidence was sufficient to support a finding of great bodily injury.

Trujillo's suggestion that the facts here are akin to those in *People v. Martinez* (1985) 171 Cal.App.3d 727 is not persuasive. On appeal, the *Martinez* court found insufficient evidence of great bodily injury in a case where the victim was cut " 'a little bit' " in his back through several layers of clothing, including a heavy coat; the victim was not taken to the hospital; and the prosecutor had moved to strike the great bodily injury allegation on the basis that the evidence showed the knife wound " 'was almost like a pinprick.' " (*Id*. at pp. 735-736.) Unlike the situation here, *Martinez* did not involve evidence that the victim was taken to a hospital, examined for internal bleeding, and receiving three sutures for a wound that ultimately left a permanent scar.

Viewing the evidence in the light most favorable to support the jury's finding, the evidence was sufficient to support the great bodily injury enhancement.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.